IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 25, 2006 Session

H. DOUGLAS LANE v. HARRY LANE, ET AL.

Appeal from the Chancery Court for Knox County
No. 146351-1 John F. Weaver, Chancellor

No. E2005-01319-COA-R3-CV - FILED AUGUST 11, 2006

In March of 2000, H. Douglas Lane ("Plaintiff") sued Harry Lane ("Defendant Lane"), E. Ladell McCullough, CPA ("Defendant McCullough"), Henderson, Hutcherson & McCullough, PLLC ("Defendant Accountants"), Harry Lane Nissan, Inc. ("the Dealership"), and Jeffrey E. Cappo ("Defendant Cappo") claiming, among other things, that the various defendants had conspired to cheat Plaintiff out of his share of the proceeds from the sale of the Dealership and that the defendants' wrongful conduct had caused Plaintiff serious mental injury. The case was tried without a jury and at the close of Plaintiff's proof, the defendants moved for an involuntary dismissal. The Trial Court dismissed Plaintiff's claims against all defendants. Plaintiff appeals to this Court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

David L. Bacon, Knoxville, Tennessee for the Appellant, H. Douglas Lane.

Darryl G. Lowe, Knoxville, Tennessee for the Appellees, E. Ladell McCullough, CPA and Henderson, Hutcherson, & McCullough, PLLC.

Linda J. Hamilton Mowles, Knoxville, Tennessee for the Appellees, Harry Lane; Harry Lane Nissan, Inc.; and Jeffrey E. Cappo.

OPINION

Background

This case was previously before this Court on issues regarding Plaintiff's ownership of stock in, and the sales price of, the Dealership. *Lane v. Lane*, No. E2003-02763-COA-R3-CV, 2005 Tenn. App. LEXIS 215 (Tenn. Ct. App. April 14, 2005) ("*Lane I*"). In *Lane I*, we affirmed the Trial Court's judgment to Plaintiff in the amount of $571,453, plus interest as Plaintiff's share in the proceeds of the sale of the Dealership.

Plaintiff claims that he owned a percentage of the Dealership along with his father, Defendant Lane[1], and that when the Dealership was sold to Defendant Cappo in 1997, all of the defendants conspired to deprive Plaintiff of his interest in the sales proceeds. Plaintiff claims that he realized that his father was not going to give Plaintiff his share of the sales proceeds only after Plaintiff received a proposed amended 1997 tax return ("the Amended 1997 Return") from Defendant McCullough and Defendant Accountants in August of 1999. Plaintiff's original 1997 tax return did not show Plaintiff owning any portion of the stock in the Dealership or owing any taxes as a result of the sale of the Dealership.

The Amended 1997 Return was sent to Plaintiff along with a cover letter. In pertinent part, the cover letter sent with the Amended 1997 Return states:

> ENCLOSED ARE YOUR 1997 AMENDED RETURNS.…
>
> * * *
>
> ENCLOSE YOUR CHECK FOR $82,196, PAYABLE TO THE INTERNAL REVENUE SERVICE.…
>
> * * *
>
> THESE RETURNS ARE BEING AMENDED TO REFLECT YOUR PERCENTAGE OF INCOME FROM THE SALE OF THE HARRY LANE NISSAN STOCK. IT IS OUR UNDERSTANDING THAT MR. HARRY I. LANE HAS INDICATED THAT HE WOULD PAY THE TAX RESULTING FROM THIS CHANGE.

[1] During the pendency of the appeal, counsel for Defendant Lane filed a Suggestion of Death of Defendant/Appellee Harry Lane pursuant to Rule 25.01of the Tennessee Rules of Civil Procedure. Our Order regarding this Suggestion of Death was entered July 31, 2006.

After receiving the Amended 1997 Return, Plaintiff sued the various defendants claiming, in part, that the defendants had conspired to cheat Plaintiff out of his share of the proceeds of the sale of the Dealership, which share Plaintiff claimed he never received. The case was tried without a jury in several stages.

The parties entered into a written stipulation stating, in pertinent part:

> The Internal Revenue Service issued, on or about April 30, 2001, a Notice of Determination to [Plaintiff], applicable to his 1997 amended Form 1040 Federal Income Tax Return. Pursuant to the Notice of Determination, the Internal Revenue Service has abated the tax, penalty, and interest applicable to the 1997 amended tax return as to the proceeds from the sale of Harry Lane Nissan, Inc. due to the lack of either actual or constructive receipt of any proceeds from the sale in 1997. As a result of the abatement, Plaintiff is not obligated to pay the tax, penalty, and interest reflected on the 1997 amended tax return.

In early October of 2001, the Trial Court tried the sole issue of the ownership of stock in the Dealership as between Plaintiff and Defendant Lane. During that trial, Plaintiff and Defendant Lane settled that issue and several other issues and on October 29, 2001, the Trial Court entered an order finding and holding, *inter alia*, that Plaintiff and Defendant Lane:

> have settled all matters in dispute between them with respect to the issues of the Plaintiff's stock ownership in Harry Lane Nissan, Inc., 1996 bonus, and stock purchase price and payment of any unpaid capital contribution.
>
> * * *
>
> Accordingly and pursuant to the Parties' agreement, it is Ordered, Adjudged and Decreed that said settlement agreement be and the same hereby is made the order and the judgment of this Court.

On July 8, 2002, Plaintiff filed a motion for an order determining the total amount due Plaintiff from Defendant Lane pursuant to the partial settlement agreement. On July 23, 2003, the Trial Court entered a Final Judgment regarding the amount due Plaintiff from Defendant Lane pursuant to the partial settlement agreement as his share of the proceeds from the sale of the Dealership and, pursuant to Tenn. R. Civ. P. 54.02, expressly made that order a final order as to that issue. Plaintiff filed a Petition to Reconsider, which the Trial Court denied. Plaintiff then appealed, and this Court affirmed the Trial Court's judgment in *Lane I*.

Trial on the remaining issues in the case spanned twelve days beginning in November of 2002, and running through February of 2005. At trial, Plaintiff testified that he was vice president and twenty-five percent owner of the Dealership from approximately 1990 until the Dealership was sold in 1997. Plaintiff testified he, Defendant Lane, Defendant McCullough, Defendant Cappo, and

Pat McNulty, the broker, were present at the closing when the Dealership was sold to Defendant Cappo. Plaintiff testified that he did not receive any monies at the closing, and did not receive any monies out of the monthly payments made by Defendant Cappo on the note. Plaintiff testified that Defendant Lane told him on a couple of occasions that he eventually would get his money. Specifically, Plaintiff testified: "When I got the amended tax return, we had a meeting out in my office in Oak Ridge, and I told [Defendant Lane] that I wasn't going to pay those taxes until I got my money, and he told me to pay those taxes that I'd get my money." Plaintiff testified that he never communicated with Defendant Cappo regarding the monthly payments.

Plaintiff testified that when he received the Amended 1997 Return, "I was completely floored. I was in - - it sent me into shock. And I tried to call [Defendant McCullough] that night, but I didn't get through to her." Plaintiff testified that he called Defendant McCullough the next day and "told her that tax return was a fraud, and she got real upset when I used the word fraud. I told her she knew that I didn't get the money because she did the deal." Plaintiff testified that he called Defendant Lane and told him they needed to talk about the amended tax return and that Defendant Lane came to Plaintiff's office where the two had what Plaintiff testified was "[a] heated conversation."

Apparently, the preparation of the Amended 1997 Return was triggered sometime in 1999, when Defendant Accountants were preparing Defendant Lane's late-filed 1997 tax return. Defendant McCullough testified: "Carl when he reviewed the documents [regarding the sale of the Dealership], and he reviewed the way the return was prepared, he said the documents spoke for themselves, and it said that [Plaintiff] was a 25-percent owner, therefore, 25 percent of the proceeds and the gain should be on his return."

William Richard Price, a certified public accountant, testified at trial. Mr. Price testified that if an accountant learns that a previously filed return contains errors, the accountant should inform the client of the error and how to correct it. Mr. Price agreed that the best way to determine how much the taxpayer will owe because of an error is to prepare an amended return, and further agreed that once the taxpayer has been notified of the error, it is the taxpayer's responsibility to file or not file the amended return. In addition, Mr. Price agreed that a taxpayer has constructively received income if it is available to him and he has the power to compel payment.

Another certified public accountant, Billy Ray Gosnell, also testified at trial. Mr. Gosnell testified that accountants operate under rules spelled out by the AICPA and one of those rules requires that if an accountant discovers that an error has been made on a tax return, the accountant must notify the client. The accountant, however, cannot compel the client to file a new return. Mr. Gosnell agreed that if you prepared the original return, the best way to notify the taxpayer of a mistake in that return would be to prepare an amended return. Mr. Gosnell also agreed that when a party pays money to an assignee, even if the assignor doesn't get the money, the assignor still has to pay tax on the money under a theory of constructive receipt.

Defendant Lane testified that he told Defendant Accountants that if Plaintiff owed any taxes on the sale of the Dealership, Defendant Lane would pay the taxes. Defendant Lane testified:

> Whenever McCullough had sent him a revised tax return, he came to my house, my wife and I, showed me a check where he had wrote a check to the internal revenue for 80-something thousand dollars. The first I had heard of it. And I said, Son, don't pay that, there's got to be a mistake. And I said, if you've got taxes due I'll take care of them. That seemed to satisfy him. He had a copy of a check like he had already paid it. I found out later that he hadn't paid it. But I made arrangements to meet him in Oak Ridge and give him the 80-something thousand dollars, whatever it was; he would not meet me."

Defendant Lane testified he was completely unaware of the Amended 1997 Return until after Plaintiff received it. He testified that Defendant Accountants never discussed the Amended 1997 Return with him before sending it to Plaintiff. Defendant Lane testified that the only instruction he ever gave Defendant Accountants was that if Plaintiff had any tax liabilities to let Defendant Lane know and Defendant Lane would pay the taxes.

Plaintiff's treating psychiatrist, Robert G. Demers, M.D., testified via deposition, which was entered as an exhibit at trial. Dr. Demers testified he first saw Plaintiff in March of 2001, when Dr. Demers took over the practice of Dr. Glenn Wright, Plaintiff's previous psychiatrist. Dr. Demers testified that he diagnosed Plaintiff with several psychiatric problems including bipolar disorder and stated:

> [b]ipolar disorder appears to have a strong genetic background. The actual etiology of bipolar disorder at this point in time is not known, but it tends to run in families. [Plaintiff's] bipolar disorder in my medical opinion has been made much worse going through legal issues and the difficulties he's had with his family.

When asked about the effect on Plaintiff of the Amended 1997 Return, Dr. Demers stated: "I believe that [Plaintiff] was shocked, surprised and also very hurt and dismayed by those events. He felt his father 'had screwed him' and he was later very angry over that issue." Dr. Demers opined: "In my medical opinion [Plaintiff's] bipolar mood swings, particularly his depressive phases, have been made considerably worse because of the incident in October 1999." However, Dr. Demers agreed that nothing that happened in 1997 or later caused Plaintiff's bipolar disorder or his diagnosed personality disorder.

Thomas P. Hanaway, PhD, a clinical psychologist who did "an evaluation [of Plaintiff] dealing with personal injury issues" also testified. Dr. Hanaway explained: "a clinical psychologist is trained to diagnose and treat psychological and mental disorders, trained to do assessment and evaluations as well as to do therapy." Dr. Hanaway testified he saw Plaintiff on

August 23, 2002, when Plaintiff was referred to him by Dr. Demers. Dr. Hanaway testified that he met with Plaintiff for "a total of about five and a half hours." Dr. Hanaway testified:

> it's my opinion that prior to [Plaintiff] concluding that his father was not going to pay him for the sale of the Morristown business that [Plaintiff] - - I'll say one exception to this - - but, in general, [Plaintiff] did not have - - meet the criteria for the mood disorder problems that occurred subsequent to him concluding that his father was not going to pay him. [Plaintiff] did have a period, a brief period of depression, when his - - he divorced his first wife in - - let's see - - in about 1989, that would be expected; that seemed like normal grieving.

Dr. Hanaway further testified:

> In September of 1999 [Plaintiff] received an amended tax return, and at that point he concluded that his father was not going to pay him the money that he was owed from the sale of that business. The next morning or the morning after that he had a meeting with his father, and he asked him for his money, and his father offered to pay the taxes but not to give him the money, and after that he became very depressed. Dr. Wright diagnosed him with major depressive disorder. Dr. Demeers diagnosed him with bipolar two disorder. He was diagnosed with bipolar one disorder at Vanderbilt Hospital. I diagnosed him bipolar two disorder, and he had a number of post-traumatic stress disorder symptoms as well after that. I believe that if he had been paid like he believes he should have been, I don't believe that he would have gotten - - he would have gotten the symptoms that he did, the mood disorder symptoms or the post-traumatic stress disorder symptoms.

Dr. Hanaway clarified: "[Plaintiff] did not meet the criteria for posttraumatic stress disorder. He had many of the symptoms but he - - … - - didn't meet the criteria for diagnosis." Dr. Hanaway testified that he believes that Plaintiff has a personality disorder NOS, which stands for not otherwise specified, with narcissistic features.

Dr. Hanaway opined, "the reason that [Plaintiff] became very depressed and also had mood elevation was because of his - - of reaching the conclusion that his father was not going to pay him for the sale of that business." Dr. Hanaway further stated, "it's my opinion that [Plaintiff] will not work for his father again. He will not be able to run a car business like he was running it for."

Dr. Hanaway testified: "I don't believe there is evidence for [Plaintiff] having bipolar disorder prior to this incident." Dr. Hanaway, however, agreed that Plaintiff's memory is functional and essentially normal, and also admitted that on July 23, 2004, during his deposition, he testified that Plaintiff's bipolar disorder essentially was in remission and had been for at least a year. Dr. Hanaway also admitted that he testified during deposition that he believes Plaintiff's personality disorder symptoms had improved over the last year. Dr. Hanaway admitted that no one has been treating Plaintiff for the past year because Dr. Demers suffered a diabetic coma and no longer was

able to treat Plaintiff. Dr. Hanaway admitted that he had stated under oath that Plaintiff's improvement in symptomology roughly coincides with the conclusion of Plaintiff's relationship with Dr. Demers. Dr. Hanaway further admitted that he is aware that Plaintiff removed himself from mood stabilizing drugs and antidepressant medications approximately one year ago without any medical authority. When questioned, Dr. Hanaway admitted that he never has seen a single person who has been diagnosed with bipolar disorder go into remission based solely upon a societal or social factor.

Dr. Hanaway admitted that he stated during his deposition that Plaintiff is likely to misstate facts under oath and that Plaintiff tends to say things that are not accurate. Dr. Hanaway agreed that nothing that occurred in 1997, through 1999, caused Plaintiff to have a personality disorder NOS because such a condition by definition has to occur in adolescence or early adulthood. Dr. Hanaway testified: "[Plaintiff] started getting depressed, I believe, in 1998 because of what he was telling me about his increased need for sleep, but it definitely happened after he got the amended tax return in September of 1999. That's when he - - he concluded that his - - he was convinced at that point that his dad was not going to pay him. He had been hopeful that he might get the payment earlier."

Portions of Defendant Cappo's deposition were read at trial. Defendant Cappo testified that when he purchased the Dealership, he made the checks out to Defendant Lane because that is how Defendant Lane and Plaintiff told him at the closing to do it. Defendant Cappo testified that he proceeded to make out the checks to Defendant Lane each month for three years and, until this lawsuit, never heard a word from anyone about it.

At the close of Plaintiff's proof, all of the defendants orally moved for an involuntary dismissal of the case pursuant to Tenn. R. Civ. P. 41.02(2). The Trial Court ordered that the motions and Plaintiff's response thereto be submitted in writing for the Trial Court's consideration. By order entered May 2, 2005, the Trial Court, *inter alia*, dismissed Plaintiff's claims of outrageous conduct against all of the defendants, dismissed Plaintiff's claims of civil conspiracy against all of the defendants, dismissed Plaintiff's claim of fraudulent inducement to breach of contract against Defendant Lane, and held that Plaintiff's claim against Defendant Lane for conversion could proceed. The Trial Court's May 2, 2005 order incorporated by reference the Trial Court's memorandum opinion, which stated, in pertinent part:

> The conduct of the Plaintiff in permitting the Defendant Cappo to pay the $900,000 to the Defendant Lane in the Plaintiff's presence with no objection and in permitting the Defendant Cappo to make the monthly note installments to the Defendant Lane for three years with no objection or communication otherwise to Defendant Cappo constitutes a waiver by the Plaintiff of any right to have the Defendant Cappo to make or to have made the payments in a different manner.
>
> The Plaintiff testified that he did not object at the closing as to his getting none of the proceeds because it would not have been appropriate. He emphasized

that the Defendant Lane was, after all, his father. Plaintiff testified to the same effect regarding the monthly installment payments. The Plaintiff purposely did not assert his right to receive any portion of the proceeds. Even when he began his initial lawsuit in Hamblen County, he did not name anyone as a defendant other than the accountants. The Plaintiff testified that he believed that he would eventually get his money from his father. But as between the Plaintiff and the Defendant Cappo and the Defendant Harry Lane Nissan, Inc., the course of the performance between the Plaintiff and the Defendant Cappo was that the Defendant Cappo would make the payments to the Defendant Lane.

* * *

The main act alleged by the Plaintiff as constituting outrageous conduct occurred when the Defendant Accountants prepared and sent the 1997 amendment to the Plaintiff's 1997 income tax return to the Plaintiff for his signing and sending to the IRS together with his payment of income taxes on sale proceeds that he never received.

However, this Court believes the testimony from the Defendant Accountants that their tax partner was of the opinion that the amendment was required to be consistent with all of the stock sale documents and because whether correctly or incorrectly the tax partner was of the opinion that the Plaintiff was in constructive receipt of his share of the proceeds. The Plaintiff's own expert testified that the methodology of preparing and sending the proposed amendment to the Plaintiff's tax return would be an acceptable method of advising a client of an error in a prior year's tax return.

The Plaintiff argues that the amendment was sent under the pretense of urgency. But still the Plaintiff's own witness testified that the preparing and sending of a proposed amendment is acceptable.…[T]his Court finds that the Defendant Accountants were acting for their own purposes in tendering the proposed 1997 amendment to the Plaintiff and so advising him of the error in his original 1997 tax return.

Even though the Internal Revenue Service may have subsequently found based upon the information given to it by the Plaintiff through his counsel that the Plaintiff was not in constructive receipt, that does not make the Defendant Accountants liable for outrageous conduct.

This Court finds and concludes that none of the Defendants in this case have done anything so outrageous in character and so extreme in degree as to be beyond the pale of decency and which may be regarded as atrocious and utterly intolerable in a civilized society so as to support an action for outrageous conduct.

This Court further finds and concludes that there is not sufficient or adequate evidence of any serious mental injury attributable to any outrageous or allegedly outrageous act. While expert testimony may not be necessary to establish the existence of serious mental injury, this Court finds and concludes the testimony of Plaintiff's experts does not connect any serious mental injury to any outrageous act. The Plaintiff's former psychiatrist testified by deposition that the Plaintiff's bipolar disorders had been made worse going through legal issues and difficulties with his family, but does not tie any serious mental injury to any outrageous act.

The Plaintiff's expert, Dr. Hanaway, a clinical psychologist, testified by deposition in effect that the Plaintiff - - the Plaintiff's becoming of the opinion that his father was not going to pay him caused or contributed to the Plaintiff's becoming severely depressed and having a diagnosis of bipolar two disorder and a number of post-traumatic stress disorder symptoms, but that testimony is not medical testimony that a particular act or conduct, which this Court can classify as outrageous, caused any such problem.

To the contrary the Plaintiff's former psychiatrist, Dr. Demers testified that the Plaintiff probably suffered from a generic bipolar disorder since his early 20s or late adolescence long before 1997. Dr. Demers also testified that the Plaintiff probably suffered from a personality disorder since late adolescence or even earlier. With respect to the Plaintiff's own testimony, this Court did not find the Plaintiff's testimony about his mental problems or emotional problems to be persuasive in this regard.

There was testimony that the Plaintiff realized when he received the 1997 tax return amendment that his father was not going to pay him, but this Court has found that the sending of the proposed 1997 tax return amendment is not outrageous and this Court further finds that the Defendant Lane's not paying the Plaintiff may have been a breach of contract or a tort, but was not an outrageous act sufficient to support a claim of outrageous conduct.

Regarding the Plaintiff's claim that the Defendant Lane induced the Defendant Cappo to breach his obligation to pay his share of the proceeds to the Plaintiff, this Court finds and concludes that the Defendant Cappo has never been in breach. From the very beginning as previously mentioned, the Plaintiff waived any right that he had to direct payment from the Defendant Cappo, and after three years, was estopped from changing the parties (sic) course of performance under the contract or note.

* * *

> Regarding the Plaintiff's claim of civil conspiracy, the Court finds and concludes that the proof fails to sustain that the Defendants or any set of the Defendants joined together for any common purpose relevant to this case or to commit any wrong upon the Plaintiff. The Defendant Lane did not pay the Plaintiff because the Plaintiff never paid for his stock. The Defendant Cappo made his payments to the Defendant Lane because that is how the course of performance began at the closing and continued for three years with no objection by the Plaintiff.
>
> The Defendant Accountants acted in their own interests in preparing and sending the 1997 tax return amendment….

The case proceeded on Plaintiff's claim for conversion and Defendant Lane rested his case without calling witnesses or presenting further evidence. The Trial Court entered a Final Order on May 20, 2005, dismissing Plaintiff's claim for conversion. In its memorandum opinion incorporated into the Final Order by reference, the Trial Court found and held, *inter alia*:

> [T]his Court construes the Plaintiff's claim in conversion to be for the money payments taken by the Defendant Lane each time he took a money payment and retained the Plaintiff's share and did not give the Plaintiff his share.…[T]his Court would find and concludes that the three-years (sic) statute of limitation does apply in part and applies to bar any action in conversion for proceeds or payments taken by Defendant Lane outside of the period of three years before the original complaint was filed, including the $100,000 deposit, the nine cashier's checks of $100,000 each, and any and all installment payments on the promissory note received by him more than three years before the date of the filing of the original complaint on March 3, 2000.
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> * * *
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> However, the Plaintiff has already settled his claims relating to the stock ownership and to payment for his share of the sale proceeds and any bonus. Per the prior settlement, the Plaintiff's claim of conversion is barred except as a basis for punitive damages.…[T]his Court further finds and concludes that this case, … is not an appropriate case for the imposition of punitive damages.
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> * * *
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> The rationale on the conversion claim is that the same compensatory damages that the claimant would receive on his conversion claim have already been paid per the settlement. The Court will dismiss the Plaintiff's claim of conversion against the Defendant Harry Lane. The court costs in this case up through the date of the order embodying the settlement will be taxed to the Defendant Harry Lane, but all court costs incurred thereafter will be taxed to the Plaintiff.

Plaintiff appeals to this Court.

Discussion

Plaintiff raises what we restate as six issues on appeal: 1) whether the Trial Court erred in holding that Plaintiff did not pay for his stock in the Dealership; 2) whether the Trial Court erred in dismissing the case when the issue of whether Plaintiff paid for his stock was waived by the actions of the defendants; 3) whether the Trial Court erred in dismissing Plaintiff's claim for conversion against Defendant Lane; 4) whether the Trial Court erred in dismissing Plaintiff's claims for outrageous conduct; 5) whether the Trial Court erred in dismissing Plaintiff's claims of conspiracy; and, 6) whether the Trial Court erred when making the award of discretionary costs.

As this Court explained in *Thompson v. Hensley*:

> When a motion to dismiss is made at the close of a plaintiff's proof in a non-jury case, the trial court must impartially weigh the evidence as though it were making findings of fact and conclusions of law after presentation of all the evidence. *See* Tenn. R. Civ. P. 41.02(2). If a plaintiff's case has not been established by a preponderance of the evidence, then the case should be dismissed if, on the facts found and the applicable law, the plaintiff has shown no right to relief. *See City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn. 1977); *Atkins v. Kirkpatrick*, 823 S.W.2d 547, 552 (Tenn. Ct. App. 1991). The standard of review of a trial court's decision to grant a Rule 41.02 involuntary dismissal is in accordance with Tenn. R. App. P. 13(d). *Atkins*, 823 S.W.2d at 552. As such, the factual findings of a trial court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Thompson v. Hensley, 136 S.W.3d 925, 929 (Tenn. Ct. App. 2003).

We begin by addressing Plaintiff's first three issues, which effectively were resolved by this Court in *Lane I* where we affirmed the Trial Court's judgment to Plaintiff in the amount of $571,453 plus interest as Plaintiff's portion of the sales proceeds for his ownership of twenty-five percent of the stock in the Dealership. Our Opinion in *Lane I* was not appealed to the Tennessee Supreme Court and, therefore, became final and binding on the parties. *See Dupuis v. Dupuis*, 811 S.W.2d 538, 539 (Tenn. Ct. App. 1991) (stating that the plaintiff did not take issue on the first appeal with the trial court's ruling on a particular issue, and "thus its decision in this regard became the law of the case at the conclusion of the first appeal.").

Plaintiff's first three issues are without merit as we find no error by the Trial Court in its decision that "[p]er the prior settlement, the Plaintiff's claim of conversion is barred except as a basis for punitive damages...[and] that the same compensatory damages that [Plaintiff] would receive on his conversion claim have already been paid per the settlement." The judgment awarded to Plaintiff in *Lane I* was an award to Plaintiff of his portion of the sales proceeds for his twenty-five percent stock ownership in the Dealership. Plaintiff now wishes to be awarded these same proceeds a second time under his conversion claim. Such is not the law, and we find no error by the Trial Court on these issues.

In addition, as to Plaintiff's third issue, we note that Plaintiff did not comply with the Tennessee Rules of Appellate Procedure and the Rules of the Court of Appeals regarding the form and contents of the brief. Rule 27 of the Tennessee Rules of Appellate Procedure provides, in pertinent part, that the brief of the Appellant shall contain:

> An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on;

Tenn. R. App. P. 27 (7).

Rule 6, of the Rules of the Court of Appeals provides, in pertinent part,:

> No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

R. Ct. App. 6 (b).

For good cause, this Court may suspend the requirements of the rules, "[h]owever, the Supreme Court has held that it will not find this Court in error for not considering a case on its merits where the plaintiff did not comply with the rules of this Court." *Bean v. Bean*, 40 S.W.3d 52, 54-55 (Tenn. Ct. App. 2000).

The section of Plaintiff's brief dealing with Plaintiff's third issue, conversion, contains nothing more than bare assertions. This section contains neither citations to the record showing where the alleged errors occurred, nor any argument or citations to case law or other authority indicating why the Trial Court may have been in error. Plaintiff did not comply with the Rules of Appellate Procedure and the rules of this Court regarding this issue and, thus, has waived this issue on review. *See Bean*, 40 S.W.3d at 55.

We next consider whether the Trial Court erred in dismissing Plaintiff's claims for outrageous conduct. Our Supreme Court discussed the tort of outrageous conduct in *Lourcey v. Estate of Scarlett*, explaining:

> We first recognized the tort of outrageous conduct in *Medlin v. Allied Inv. Co.*, 217 Tenn. 469, 398 S.W.2d 270, 274 (1966), where we adopted the language of the Restatement (Second) of Torts, section 46, which provided: "One who by extreme and outrageous conduct … causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm [to the other] results from it, for such bodily harm."
>
> To state a claim for intentional infliction of emotional distress, a plaintiff must establish that: (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997).

In describing these elements, we have emphasized that it is not sufficient that a defendant "has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress." *Id*. (citations omitted). A plaintiff must in addition show that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn. 1999) (quoting Restatement (Second) of Torts § 46 cmt. d (1965)).

Lourcey v. Estate of Scarlett, 146 S.W.3d 48, 51 (Tenn. 2004).

In the case now before us, the Trial Court held:

> that none of the Defendants in this case have done anything so outrageous in character and so extreme in degree as to be beyond the pale of decency and which may be regarded as atrocious and utterly intolerable in a civilized society so as to support an action for outrageous conduct.

Further, the Trial Court found and held:

> there is not sufficient or adequate evidence of any serious mental injury attributable to any outrageous or allegedly outrageous act. While expert testimony may not be necessary to establish the existence of serious mental injury, this Court finds and concludes the testimony of Plaintiff's experts does not connect any serious mental injury to any outrageous act. The Plaintiff's former psychiatrist testified by deposition that the Plaintiff's bipolar disorders had been made worse going through

> legal issues and difficulties with his family, but does not tie any serious mental injury to any outrageous act.

We agree with the Trial Court that the evidence shows that neither Defendant Lane's actions in keeping the money from the sale of the Dealership, nor the act of sending the Amended 1997 Return to Plaintiff were sufficiently outrageous in character as to be atrocious and utterly intolerable in civilized society so as to support a claim for outrageous conduct. The evidence does not preponderate against the Trial Court's findings relative to this issue. Given the facts as found and the applicable law, Plaintiff has shown no right to recover on his claims for outrageous conduct against any of the defendants. The Trial Court correctly dismissed the claims of outrageous conduct against all defendants.

We next consider whether the Trial Court erred in dismissing Plaintiff's claims of conspiracy. "An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002).

The Trial Court found and held that "the proof fails to sustain that the Defendants or any set of the Defendants joined together for any common purpose relevant to this case or to commit any wrong upon the Plaintiff." The evidence shows that Defendant Lane was completely unaware of the Amended 1997 Return until after it had been received by Plaintiff. The evidence further shows that Defendant Cappo made payments to Defendant Lane as he was instructed to do at the closing and for three years made monthly payments to Defendant Lane with no objection from Plaintiff whatsoever. Defendant Lane testified that the only instruction he ever gave to Defendant Accountants was to let him know if Plaintiff had any tax liabilities so that Defendant Lane could pay those taxes. The evidence fails to show that any two or more defendants had "the intent and knowledge of the other's intent, [to] accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff." *Trau-Med of Am., Inc.*, 71 S.W.3d at 703. The evidence does not preponderate against the Trial Court's findings relative to this issue and under the facts as found and the applicable law, Plaintiff has shown no right to relief on these claims. The Trial Court correctly dismissed Plaintiff's claims of civil conspiracy.

Finally, we consider whether the Trial Court erred when making the award of discretionary costs. The Trial Court's May 20, 2005, Final Order states:

> It is further Ordered that the costs of this cause are taxed as follows: (1) all costs incurred from the filing of the original Complaint to and through the date of October 29, 2001, which was the date the Court entered an Order approving the partial settlement of this case, shall be taxed to Defendant Harry Lane; and (2) all remaining costs are taxed to Plaintiff H. Douglas Lane and his surety.

Our review of the record reveals that Defendant McCullough and Defendant Accountants filed a motion and supporting documentation requesting discretionary costs in the amount of $16,073.96. Plaintiff filed a motion and supporting documentation requesting discretionary costs accrued through October 29, 2001, in the amount of $2,241.00. Defendant Lane filed a motion with supporting documentation requesting discretionary costs in the amount of $23,466.73.

The Trial Court entered an order August 9, 2005, awarding Defendant McCullough and Defendant Accountants a judgment for discretionary costs against Plaintiff in the amount of $14,370.61; awarding Defendant Lane a judgment for discretionary costs against Plaintiff in the amount of $12,593.28; and awarding Plaintiff a judgment for discretionary costs against Defendant Lane in the amount of $2,241.00.

In pertinent part, Rule 54.04 of the Tennessee Rules of Civil Procedure provides:

> **54.04. Costs. –** (1) Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs, …
>
> (2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs.…

Tenn. R. Civ. P. 54.04. Thus, we review a Trial Court's decision to award discretionary costs for abuse of discretion. *E.g., Massachusetts Mut. Life Ins. Co. v. Jefferson,* 104 S.W.3d 13, 32 (Tenn.Ct. App. 2002).

Our Supreme Court discussed the abuse of discretion standard in *Eldridge v. Eldridge*, stating:

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made." A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

Appellate courts ordinarily permit discretionary decisions to stand when reasonable judicial minds can differ concerning their soundness. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694,

709 (Tenn. Ct. App. 1999). A trial court's discretionary decision must take into account applicable law and be consistent with the facts before the court. *Id.* When reviewing a discretionary decision by the trial court, the "appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision." *Id*.

Plaintiff argues, in part, that no party should be awarded discretionary costs because "[t]his cause was a good-faith cause that was tried and presented to the court throughout a lengthy process which was drawn out by the actions of the Defendants and their expert witnesses." Plaintiff also argues, that no costs should be awarded against him prior to October 30, 2001. Plaintiff appears to be arguing that based upon the Trial Court's Final Order, he should not be ordered to pay the discretionary costs of Defendant McCullough and Defendant Accountants prior to October 30, 2001, as the Trial Court ordered Defendant Lane to pay discretionary costs incurred through October 29, 2001. Finally, Plaintiff argues that some of the costs claimed in Defendant Lane's motion for discretionary costs are inappropriate because they were incurred after October 29, 2001, or are for costs not allowable under Tenn. R. Civ. P. 54.04.

Clearly it was not the intent of the Trial Court to require Defendant Lane to pay the discretionary costs of the other defendants. The Trial Court's Final Order specifically references its order approving the partial settlement as the critical date for the shifting of the taxing of discretionary costs. Defendant McCullough and Defendant Accountants were not involved in the partial settlement. As such, it defies logic to conclude that the Trial Court would tax the discretionary costs of Defendant McCullough and Defendant Accountants to Defendant Lane. This argument is without merit.

We have carefully reviewed the record regarding Plaintiff's claim that some of the costs contained in Defendant Lane's motion are inappropriate. We note, that Defendant Lane's motion requested discretionary costs in the amount of $23,466.73, but Defendant Lane was awarded only $12,593.28 in discretionary costs. The Trial Court did review the costs requested by Defendant Lane and disallowed those incurred before October 29, 2001, and those not allowable under Tenn. R. Civ. P. 54.04. We find no abuse of discretion in the Trial Court's award of discretionary costs.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, H. Douglas Lane, and his surety.

_____

D. MICHAEL SWINEY, JUDGE